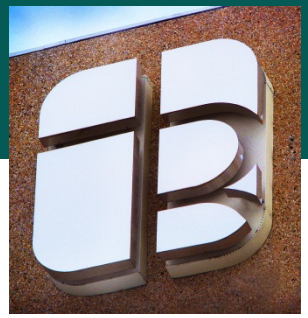

HARRIS BEACH PLLC
ATTORNEYS AT LAW

CASE LAW UPDATE
2011 Land Use Planning Cases

Timothy A. Frateschi, Esq.
Harris Beach PLLC
tfrateschi@harrisbeach.com
333 Washington Street
Syracuse, New York 13202

www.harrisbeach.com

SPOT ZONING

- *Rotterdam Ventures, Inc. v. Town Board of the Town of Rotterdam*, 90 A.D. 3rd 1360

  FACTS: The owner of an industrial park brought an Article 78 proceeding against the Town for re-zoning an adjacent parcel from Industrial to Residential. Both Industrial properties had been owned by the United States and the industrial park was used for a army depot and adjacent parcel was used for housing. The residential units were exempt from zoning while the United States owned it.

  When the Town revised its zoning and comprehensive plan in 2009, it never changed the classification where the housing units were from Industrial to Residential. The Petitioner claimed that because the zoning was not changed during the revisions to the comprehensive plan, any subsequent changes would be spot zoning.

Timothy A. Frateschi, Esq.
(315) 214-2035

LAW

- Spot zoning "is defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area for the benefit of the owner of said property to the detriment of other owners" (*Matter of Citizens for Responsible Zoning v. Common Council of the City of Albany*, 56 A.D. 3d 1060)
- Factors to consider:
  - Is the rezoning consistent with a comprehensive land use plan?
  - Is the rezoning compatible with surrounding uses?
  - Is there likely to be harm to surrounding properties?
  - The availability or suitability of other parcels.
  - The recommendation of professional planning staff.

Timothy A. Frateschi, Esq.
(315) 214-2035

ANALYSIS

- While the rezoned parcel abuts the industrial park, it also projects into an area of predominately residential use.
- The senior planner for the Town concluded that the residential use would provide a good transition to the industrial.
- The changes to the Comprehensive Plan did not evaluate the rezoned property.
- Decision – Petitioner did not overcome the strong presumption that the zoning decisions by the Town are valid unless the decision was arbitrary and unreasonable or otherwise unlawful.

  TOWN'S DECISION UPHELD

Timothy A. Frateschi, Esq.
(315) 214-2035

SPECIAL USE PERMITS

- *Kinderhook Dev. LLC v. City of Gloversville Planning Board*, 88 AD3rd 1207

  FACTS: Petitioner wanted to construct four multifamily apartment buildings containing 48 affordable housing units. Zoning for the parcel allowed multifamily housing with a special permit and site plan approval. Petitioner provided the City with a Storm Water Pollution and Prevention Plan (SWPP) to address concerns that were raised about water runoff. The City accepted the SWPP, declared itself lead agency and subsequently issued a negative declaration. After a public hearing revealed widespread neighborhood opposition to the project, the City disapproved the Petitioner's application for a special permit and site plan, citing the water runoff issue as a ground for its decision.

Timothy A. Frateschi, Esq.
(315) 214-2035

LAW

- The classification of a particular use as permitted in a zoning district is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood. (*Matter of Twin County Recycling Corp. v. Yevoli*, 90 NY2d 1000, 1002)
- The City is free to evaluate the application and reject, even after a Neg. Dec. it "if there were specific reasonable grounds … to conclude that the proposed special use was not desirable at the particular location."
- The City's determination must be supported by substantial evidence in the record. (*Matter of Steenrod v. City of Oneonta*, 69 AD3d 1030)

Timothy A. Frateschi, Esq.
(315) 214-2035

ANALYSIS

- The engineering analysis submitted established that the project would reduce the preexisting runoff problems.
- The City relied on that evidence in issuing a negative declaration under SEQRA.
- Although a SEQRA determination is not binding upon the rendering of the ultimate decision, conclusory opinions of neighbors opposed to the project is not evidence that can be used to reject a special permit.
- A planning board member stated, “people living in a particular neighborhood know more about the physical conditions of where they live than any experts brought in by the applicant.”
- Inasmuch as the City relied upon “generalized community objections” rather than the unchallenged empirical evidence in denying petitioner’s application … the determination was not supported by substantial evidence.
- TOWN’S DECISION REVERSED

Timothy A. Frateschi, Esq.
(315) 214-2035

OPEN SPACES

- Matter of Michael Fuentes v. Planning Board of the Village of Woodbury, 82 AD3d 883

  FACTS: Petitioner purchases two undeveloped lots at a tax sale. After acquiring title, he reviewed the filed subdivision maps and learned that the lots were designated "Open Area 'A'" and "Open Area 'B'" and were subject to a cluster development map notation stating that they were "not approved for building lots." Petitioner sought amendments to the map and permission from the Planning Board to build on the lots. The Planning Board denied his request interpreting the map note as mandating that the lots in question were to remain open space in perpetuity, and that it would not be in the best interest of the public to allow building.

Timothy A. Frateschi, Esq.
(315) 214-2035

LAW

- Town Law 278 permits a town to authorize a cluster development, which allows a relaxation in certain dimensional requirements.
- The authorization has to be done properly, or else cluster development is ineffective.
- Even if cluster development is ineffective, the planning board has the authority to restrict development, provided that it does so in such a way to give notice to all interested parties.

Timothy A. Frateschi, Esq.
(315) 214-2035

ANALYSIS

- While the note on the map was part of the chain of title, it was not specific enough to convey a perpetual restriction on development of the lots. (*Town of Brookhaven v. Dinos*, 76 AD2d 555)
- The planning board's finding that removing the restriction recorded on the map would be detrimental to the public welfare was conclusory and lacked a rational basis.
  - Lessons Learned:
    - Properly follow the rules for cluster development
    - If the planning board wants to restrict development on open land, make the language very clear
    - Require the applicant to reference the subdivision restriction in its deed

  DECISION – TOWN OVERTURNED

Timothy A. Frateschi, Esq.
(315) 214-2035

IMPOSING CONDITIONS

- *Greencove Associates, LLC v. Town Board of the Town of North Hempstead* (87 AD3d 1066)

  FACTS: Petitioner owns a 5.26 acres parcel of land that is improved by a commercial shopping center. When the commercial shopping center was approved there was a condition that a landscape buffer be situated along a portion of the parcel bordering a residential neighborhood. Petitioner requested a 10,000 sq. ft. expansion that would encroach on the landscape buffer. County Planning recommended reducing the size of the expansion to 6,800 sq. ft. After a public hearing, the planning board approved the site plan with the condition that it be no larger than 6,800 sq. ft. Petitioner brought an Article 78 proceeding claiming that the 10,000 sq. ft. expansion was allowed under the Town Code and the condition imposed by the planning board was illegal.

Timothy A. Frateschi, Esq.
(315) 214-2035

LAW

- Town Law 274-a (Site Plan) authorizes a town board (or its designee) to review site plans which describe proposed land use elements, including "parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of buildings, adjacent land uses and physical features meant to protect adjacent land uses as well as any additional elements specified by the town board in its local law.
- The Town Code provides that in determining approval, the town board shall consider "overall impact on the neighborhood, including compatibility of design considerations and adequacy of screening from residential properties.
- A condition may be imposed upon a property as long there is a reasonable relationship between the problem being sought to be alleviated and the application concerning the property. (*Matter of International Innovative Tech. Gr. V. Planning Bd of Woodbury*, 20 AD 3rd 531)

Timothy A. Frateschi, Esq.
(315) 214-2035

ANALYSIS

- Although the proposed 10,000 sq. ft. building was dimensionally code compliant, it could not be constructed without encroaching on the existing buffer.
- The landscape buffer is a reasonable means of assuring that the shopping center would not unreasonably affect the residential neighborhood.
- Requiring the expansion to be reduced to preserve the buffer is also a reasonable condition to preserve the integrity of the neighborhood.

  DECISION – TOWN UPHELD

Timothy A. Frateschi, Esq.
(315) 214-2035

WHO SHOULD APPLY

- *Duchmann v. Town of Hamburg*, (90 AD 3rd 1642)

  FACTS: Billboard advertising company enters into a lease to place a billboard on a property owner's property. The lease gave the company a perpetual easement, including "the right to service, maintain, improve or replace any outdoor advertising structure on the property." The company received a permit to build a billboard from the ZBA. Subsequently, the company wanted to convert the billboard to an electronic billboard. The ZBA granted the permit. The property owner objected and claimed the ZBA didn't have the right to grant the permit without his approval.

Timothy A. Frateschi, Esq.
(315) 214-2035

LAW

- Hamburg Town Code states that “prior to issuance of any sign permit for the erection, alteration, construction, relocation or enlargement of a sign, application for such permit shall be made.”
- It further states that the application must contain “the written consent of the owners of the property.”

Timothy A. Frateschi, Esq.
(315) 214-2035

ANALYSIS

- It was not arbitrary and capricious for the ZBA to conclude that the language of the easement provided the necessary written consent for the electronic sign change.
- The change in format on the sign could be either viewed as an improvement or a replacement, therefore meeting the requirements of the Town Code.

  DECISION – TOWN UPHELD

Timothy A. Frateschi, Esq.
(315) 214-2035

CAN A POS. DEC. BE CHALLENGED

- *Bell Atlantic Mobile of Rochester LP v. Town of Irondequoit* (US Dist. Ct. WNY, No. 11-CV-6141-CJS-MW P)

  FACTS: Verizon Wireless applied to the town to construct a 120 ft. cellular tower. On June 3, 2010, a preliminary meeting was held between Verizon and the town. On June 18, 2010 Verizon applied for a permit to construct the tower at the fire station, where a tower already existed. From that date until January 12, 2011, the town asked for, and received several modifications to the tower. At its February 15, 2011 meeting, the town designated itself lead agency under SEQRA and issued a positive declaration. On March 10, 2011, the attorney for the town told Verizon there was an alternative site the town wanted considered. Verizon brought a motion for summary judgment.

Timothy A. Frateschi, Esq.
(315) 214-2035

LAW

- The Telecommunications Act of 1966 (47 U.S.C. §332(c)) makes telecommunications companies utilities for purposes of state and federal regulation.
- As such, while utilities are subject to zoning, Federal law limits a municipalities ability to stop or slow down the cell tower siting process.
- "Shot Clock" order – in interpreting the Acts requirement that an application must be decided in a "reasonable period of time", the FCC determined that a 90 day process for co-location and 150 days process on all other applications is a reasonable time.
- SEQRA requires that "as early as possible in the formulation of a proposal for an action, the responsible agency shall make an initial determination whether an environmental impact statement need to be prepared for the action. Environmental Conservation Law § 8-0101.

Timothy A. Frateschi, Esq.
(315) 214-2035

ANALYSIS

- Verizon argued that the town's positive declaration was "plainly pre-textual and wholly unjustified under SEQRA."
- The Court agreed.
- The argument that cumulative impacts needed to be studied was rejected, since there were no other proposed or pending developments needing the utility.
- Speculative environmental loss, such as concern for property value, is not an environmental factor to be considered under SEQRA.
- Public controversy, not tied to a specific potential impact, is not sufficient to issue a positive declaration. Generalized community objections …cannot alone constitute substantial evidence, especially in circumstances where there was ample opportunity for the objecting party to produce reliable, contrary evidence.

DECISION – TOWN OVERTURNED

Timothy A. Frateschi, Esq.
(315) 214-2035

PRIVATE ROADS

- *In the Matter of Takourian v Town of Bether Zoning Board of Appeals*, 90 A.D. 3rd 1454
  - FACTS: Land owners owned three contiguous parcels that were bisected by a private road. The Town Code defined a lot as "a piece or parcel of land occupied or intended to be occupied by a principal building … and accessory building … and having frontage on the street." The landowner built a two car garage on a parcel of land across on the other side of the private road from his residence. The neighbor sued claiming the garage was not permitted because it was on a separate parcel and you can't have an accessory use where there is no principal use.

Timothy A. Frateschi, Esq.
(315) 214-2035

LAWS

- The ZBA, in interpreting the Code determined that where the parcels are contiguous, the Code did not intend to treat parcels separated by a private road differently from parcels separated by a public road.

Timothy A. Frateschi, Esq.
(315) 214-2035

ANALYSIS

- Finding the ZBA's conclusion was rational and supported by the record, the court declined to disturb the determination.
- It also rejected other claims based on Public Officer's Law and Town Law 267-a.

DECISION- TOWN UPHELD

Timothy A. Frateschi, Esq.
(315) 214-2035

AREA VARIANCE?

In the Matter of Nestor Cacsire, et al v. City of White Plains ZBA, Cite

FACTS: Petitioner purchased property that included a house that was being used as a two family house. The house was built in 1904 and was located in a residential neighborhood zoned for one and two-family houses. When Petitioner purchased the house, it was listed as a two family, the mortgage stated it was a two family, and the title insurance policy identified it as a two-family. Petitioner applied, and received a building permit to reconstruct a kitchen on the second floor. After the work was done, he went to get his certificate of compliance. Guess what the zoning office said?

Timothy A. Frateschi, Esq.
(315) 214-2035

LAW

- The property owner was told it's a one-family home. Either he had to get area variances or take the second floor off.
- We all know the balancing test.
- The ZBA determined that area variances:
  - Were substantial
  - Would result in a detriment to the neighborhood
  - Would adversely change the character of the neighborhood
  - The hardship was self created

Timothy A. Frateschi, Esq.
(315) 214-2035

ANALYSIS

- Although local zoning boards have broad discretion in considering applications for variances, a court can overturn the decision if it is illegal, arbitrary or an abuse of discretion.
- "Conclusory findings of fact are insufficient to support a determination by a ZBA, which is required to clearly set forth 'how' and 'in what manner' the ranting of the variance would be improper." *Matter of Gabriell Realty Corp. v. Board of Zoning Appeal of Village of Freeport*, 24 AD3d 550.
- Further, a determination will not be deemed rational if it resets entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis. (Matter of Halperin v. City of New Rochelle, 24 AD3d 772)
- In this case, while the variances may have been substantial, there was no evidence supporting the other determinations. In fact, the record showed that the property was used as a two-family house for over 50 years, there are several two-family residents in the neighborhood, that there would not be any more traffic or congestion if the variances were granted, and there was no community opposition.

DECISION: TOWN OVERTURNED

Timothy A. Frateschi, Esq.
(315) 214-2035